

Exhibit 10

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Page 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----:

IN RE NAMENDA DIRECT PURCHASER :

:No. 15-cv-7488-CM-JCF

ANTITRUST LITIGATION :

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Washington, D.C.

Wednesday, October 18, 2017

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Videotaped Deposition of:

RODERICK McKELVIE,

called for oral examination by counsel for
Plaintiff, pursuant to notice, at the office of
White & Case, LLP, 701 13th Street, N.W., before
SUSAN L. CIMINELLI, CRR, RPR, of Veritext Legal
Solutions, a Notary Public in and for the District
of Columbia, beginning at 9:06 a.m., when were
present on behalf of the respective parties:

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| Page 2 | Page 4 |
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| <p>1 APPEARANCES</p> <p>2 On behalf of Plaintiff:</p> <p>3 RUSSELL A. CHORUSH, ESQUIRE</p> <p>4 Heim, Payne & Chorush, LLP</p> <p>5 Heritage Plaza</p> <p>6 1111 Bagby</p> <p>7 Suite 2100</p> <p>8 Houston, Texas 77002</p> <p>9 (713) 221-2000</p> <p>10 rchorush@hpllp.com</p> <p>11 On behalf of Defendants:</p> <p>12 RYAN P. JOHNSON, ESQUIRE</p> <p>13 White & Case, LLP</p> <p>14 1221 Avenue of the Americas</p> <p>15 New York, New York 10020-1095</p> <p>16 (212) 819-8893</p> <p>17 rjohnson@whitecase.com</p> <p>18 -and-</p> <p>19 ERICA R. SUTTER, ESQUIRE</p> <p>20 White & Case, LLP</p> <p>21 3000 El Camino Real</p> <p>22 Five Palo Alto Square</p> <p>9th Floor</p> <p>Palo Alto, California 94306-2109</p> <p>(650) 213-0338</p> <p>erica.sutter@whitecase.com</p> <p>ALSO PRESENT:</p> <p>PATRICK GRAHAM, Video Technician</p> <p>* * * * *</p> | <p>1 McKELVIE DEPOSITION EXHIBITS: PAGE</p> <p>2 Exhibit 13 LexisNexis CFMT, Inc. 209</p> <p>3 Exhibit 14 LexisNexis Manchack 98-1530 215</p> <p>4 Exhibit 15 LexisNexis The Johns Hopkins</p> <p>5 University v. CellPro 217</p> <p>6 Exhibit 16 Order AbbVie No. 14-5151 220</p> <p>7 Exhibit 17 Memorandum FTC v. AbbVie 222</p> <p>8 Exhibit 18 FTC v. AbbVie Memorandum in Support of</p> <p>9 Plaintiff 223</p> <p>10 Exhibit 19 LexisNexis Merck Sharp & Dohme 227</p> <p>11 Exhibit 20 LexisNexis In re Copaxone Consolidated 230</p> <p>12 Exhibit 21 LexisNexis Aventis Pharma v. Hospira 232</p> <p>13 Exhibit 22 LexisNexis Santarus v. Par 234</p> <p>14 Exhibit 23 LexisNexis AbbVie v. Hospira 236</p> <p>15 Exhibit 24 LexisNexis Tris Pharma, Inc. v. Actavis 238</p> <p>16 Exhibit 25 LexisNexis Allergan v. Watson 239</p> <p>17 Exhibit 26 LexisNexis Pliva v. Gladys Mensing 245</p> <p>18</p> <p>19 (Exhibits attached to transcript.)</p> <p>20</p> <p>21</p> <p>22</p> |
| Page 3 | Page 5 |
| <p>1 CONTENTS</p> <p>2 RODERICK McKELVIE</p> <p>3 EXAMINATION BY: PAGE</p> <p>4 Counsel for Plaintiff 6</p> <p>5</p> <p>6</p> <p>7 McKELVIE DEPOSITION EXHIBITS: PAGE</p> <p>8 Exhibit 1 Expert Report of Roderick McKelvie 7</p> <p>9 Exhibit 2 AIPLA Quarterly Journal v.34 2006 70</p> <p>10 Exhibit 3 Generic Drug Entry Prior to Patent</p> <p>11 Expiration FTC Study July 2002 74</p> <p>12 Exhibit 4 Lemley article Fall 2010 79</p> <p>13 Exhibit 5 The Fractioning of Patent Law/Lemley 82</p> <p>14 Exhibit 6 RBC Capital Markets January 15, 2010 88</p> <p>15 Exhibit 7 AndroGel Transcript McKelvie 4/19/17 89</p> <p>16 Exhibit 8 Mylan's Defenses in the Namenda Patent</p> <p>17 Litigation 121</p> <p>18 Exhibit 9 FRX-AT-03882414-2420</p> <p>19 Forest-Mylan Meeting 2/11/10 148</p> <p>20 Exhibit 10 U.S. Patent 5,061,703 197</p> <p>21 Exhibit 11 LexisNexis EMI Group 213</p> <p>22 Exhibit 12 LexisNexis Manchack 215</p> | <p>1 PROCEEDINGS</p> <p>2 VIDEO TECHNICIAN: Good morning. We are</p> <p>3 going on the record at 9:06, on October 18th, 2017.</p> <p>4 This is the video recorded deposition of Roderick</p> <p>5 McKelvie, in the matter In Re Namenda Direct</p> <p>6 Purchaser Antitrust Litigation, filed in the United</p> <p>7 States District Court, Southern District of New</p> <p>8 York.</p> <p>9 This deposition is being held at White &</p> <p>10 Case, located at 701 13th Street, Northwest,</p> <p>11 Washington D.C., 20005. My name is Patrick Graham</p> <p>12 from the firm Veritext, and I'm the videographer.</p> <p>13 The court reporter is Sue Ciminelli from Veritext.</p> <p>14 Will counsel please introduce themselves beginning</p> <p>15 with the party noticing this proceeding.</p> <p>16 MR. CHORUSH: This is Russell Chorush of</p> <p>17 the law firm of Heim, Payne & Chorush, on behalf of</p> <p>18 the plaintiffs.</p> <p>19 MR. JOHNSON: Ryan Johnson from White &</p> <p>20 Case on behalf of defendants and the witness. And</p> <p>21 with me is my colleague, Erica Sutter.</p> <p>22 VIDEO TECHNICIAN: Will the court</p> |

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| <p style="text-align: right;">Page 6</p> <p>1 reporter please swear in the witness?</p> <p>2 Whereupon,</p> <p>3 RODERICK McKELVIE,</p> <p>4 was called as a witness by counsel for Plaintiff,</p> <p>5 and having been duly sworn, was examined and</p> <p>6 testified as follows:</p> <p>7 EXAMINATION BY COUNSEL FOR PLAINTIFF</p> <p>8 BY MR. CHORUSH:</p> <p>9 Q. Good morning. Please state your full</p> <p>10 name?</p> <p>11 A. Roderick Radcliff McKelvie.</p> <p>12 [REDACTED]</p> <p>13 [REDACTED]</p> <p>14 [REDACTED]</p> <p>15 Q. Do you understand that your testimony</p> <p>16 today is being given under oath?</p> <p>17 A. Yes.</p> <p>18 Q. Do you understand that the oath that</p> <p>19 you've taken today at this deposition is just as</p> <p>20 solemn as the oath that you would take if testifying</p> <p>21 at trial?</p> <p>22 A. I do.</p> | <p style="text-align: right;">Page 8</p> <p>1 Q. Is Exhibit 1 a true and correct copy of</p> <p>2 the expert report that you submitted in this case?</p> <p>3 A. It appears to be.</p> <p>4 MR. JOHNSON: Take your time if you need</p> <p>5 to, to check things like that.</p> <p>6 THE WITNESS: It appears to have all the</p> <p>7 pages.</p> <p>8 BY MR. CHORUSH:</p> <p>9 Q. On page 39 is a signature. Is that your</p> <p>10 signature?</p> <p>11 A. It is.</p> <p>12 Q. I plan to refer to Exhibit 1 as your</p> <p>13 report or the McKelvie report. Is that acceptable</p> <p>14 to you?</p> <p>15 A. That's fine.</p> <p>16 Q. Which attorneys for Forest have you</p> <p>17 interacted with in connection with your work in this</p> <p>18 matter?</p> <p>19 A. Erica and Ryan only.</p> <p>20 Q. You're referring to Erica Sutter, is that</p> <p>21 correct?</p> <p>22 A. Correct. Ryan Johnson.</p> |
| <p style="text-align: right;">Page 7</p> <p>1 Q. Do you understand that your testimony can</p> <p>2 be used at trial?</p> <p>3 A. I assume so.</p> <p>4 Q. Is there any reason why you cannot --</p> <p>5 strike that.</p> <p>6 Is there any reason that you cannot</p> <p>7 testify fully and accurately today?</p> <p>8 A. Not that I know of.</p> <p>9 Q. I'll be happy to provide you breaks</p> <p>10 throughout the course of the deposition. I would</p> <p>11 just request that you let me know a few minutes</p> <p>12 ahead of time, so that I can wrap up the line of</p> <p>13 questioning that I'm on.</p> <p>14 A. That's fine.</p> <p>15 Q. Thank you.</p> <p>16 (McKelvie Exhibit No. 1 was</p> <p>17 marked for identification.)</p> <p>18 BY MR. CHORUSH:</p> <p>19 Q. I've placed in front of you the McKelvie</p> <p>20 report marked as Exhibit 1 to this deposition. Do</p> <p>21 you see that?</p> <p>22 A. I do.</p> | <p style="text-align: right;">Page 9</p> <p>1 Q. How much time have you spent preparing</p> <p>2 your report and preparing to give your deposition</p> <p>3 today?</p> <p>4 A. A little over 130 hours.</p> <p>5 Q. Who wrote your report?</p> <p>6 A. I wrote my first draft of the report, and</p> <p>7 then I worked with counsel in improving it.</p> <p>8 Q. I will refer to Forest Laboratories, Inc.</p> <p>9 as Forest. Is that acceptable to you?</p> <p>10 A. Yes, that's fine.</p> <p>11 Q. I will refer to Mylan Pharmaceuticals,</p> <p>12 Inc. as Mylan. Is that acceptable to you?</p> <p>13 A. Yes, that's fine.</p> <p>14 Q. In 2008, Forest filed patent infringement</p> <p>15 lawsuits against Mylan and a number of other</p> <p>16 generics, alleging infringement of United States</p> <p>17 Patent Number 5,061,703, correct?</p> <p>18 A. Correct.</p> <p>19 Q. If I refer to United States Patent Number</p> <p>20 5,061,703 as the '703 patent, will you understand</p> <p>21 me?</p> <p>22 A. Yes.</p> |

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CONFIDENTIAL

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| <p style="text-align: right;">Page 66</p> <p>1 [REDACTED] 2 [REDACTED] 3 [REDACTED] 4 [REDACTED] 5 [REDACTED] 6 BY MR. CHORUSH: 7 Q. And when you say, no, I can't tell if you 8 were agreeing with me, or disagreeing with me. Did 9 you offer any opinion in your report that the time 10 frame for an appellate decision from the Federal 11 Circuit would be longer than 12 months? 12 A. The whole process I said could be as late 13 as October of 2012. 14 Q. To get to an exhaustion of all appeals, 15 correct? 16 A. Right. 17 Q. I'm talking about the time when a Federal 18 Circuit decision would be issued. 19 A. Well, it would be a number of months 20 short of October 2012. It could be April 2012. As 21 I said, approximately 12 months. 22 MR. CHORUSH: We've been going about an</p> | <p style="text-align: right;">Page 68</p> <p>1 A. Yes. 2 Q. Is it common, in your experience, for a 3 patent attorney to provide the client with the 4 attorney's assessment of the likelihood of success 5 in patent infringement litigation? 6 A. Yes. 7 Q. In your opinion, does experience with 8 patent litigation provide patent attorneys with any 9 specialized knowledge from which to evaluate 10 likelihood of success in patent infringement cases? 11 A. It does. 12 Q. One of the factors patent attorneys 13 consider in advising a client on whether or not to 14 settle a patent infringement case is the time and 15 expense it will take to reach a resolution of the 16 litigation if the case does not settle, correct? 17 A. Did you say it was clients or lawyers? 18 Q. One of the factors that the patent 19 attorney considers in advising the client on whether 20 or not to settle is the time and expense it will 21 take to reach a resolution of the litigation if the 22 case doesn't settle?</p> |
| <p style="text-align: right;">Page 67</p> <p>1 hour. 2 MR. JOHNSON: I was just going to say 3 that. 4 MR. CHORUSH: Yeah, it's up to you. 5 MR. JOHNSON: I'm personally game for a 6 break. 7 MR. CHORUSH: Okay, sounds good. 8 VIDEO TECHNICIAN: We are off the record 9 at 10:07. 10 (Recess.) 11 VIDEO TECHNICIAN: We are back on record 12 at 10:20. 13 BY MR. CHORUSH: 14 Q. One of the factors that patent attorneys 15 consider in advising clients on whether or not to 16 settle a patent infringement case is likelihood of 17 success, correct? 18 A. Yes. 19 Q. Is it common, in your experience, for 20 clients to seek their attorney's advice, in terms of 21 evaluating likelihood of success in patent 22 litigation?</p> | <p style="text-align: right;">Page 69</p> <p>1 MR. JOHNSON: Objection to form. 2 THE WITNESS: It's my experience -- 3 MR. JOHNSON: Objection, outside the 4 scope. 5 THE WITNESS: My experience is this is 6 something that mainly comes from the client, as 7 opposed to the lawyer. The client asks the lawyer 8 advice about time and expense. 9 BY MR. CHORUSH: 10 Q. Do patent lawyers typically provide that 11 type of advice? 12 A. They try to. 13 Q. Does experience with patent litigation 14 provide patent attorneys with specialized knowledge 15 from which to evaluate the likely costs and timing 16 in patent infringement litigation? 17 MR. JOHNSON: Objection. 18 THE WITNESS: It can. 19 BY MR. CHORUSH: 20 Q. Do you agree that early in a patent 21 infringement lawsuit, statistical studies can be a 22 helpful tool for patent attorneys in getting a</p> |

18 (Pages 66 - 69)

Page 72

11 Q. So you did read it in the context of
12 forming your opinions in this case, correct?
13 A. I skimmed it.

Page 73

7 Q. I'm trying to distinguish between two
8 things, and I think I understand your position that
9 the conclusions in the Janicke study aren't
10 relevant. I'm asking a different question, which is
11 whether or not you have any basis or you've
12 identified one for doubting the accuracy of the
13 conclusions. They might, in theory, be irrelevant
14 to this case. I understand your position on that.
15 But that's not my question. Do you understand the
16 distinction that I'm drawing?

17 A. Yes. But I haven't made a judgment about
18 the accuracy of his conclusions. I made a judgment
19 about the relevance of his conclusions. If I
20 thought they were relevant, I would then make a
21 judgment about the accuracy.

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| <p style="text-align: right;">Page 78</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>6 Q. If the Court ultimately finds that any of</p> <p>7 the accused infringer's validity defenses have been</p> <p>8 established, the accused infringer wins, correct?</p> <p>9 A. If the patent is found invalid, yes.</p> <p>10 Q. So the accused infringer can win a</p> <p>11 lawsuit by prevailing on non-infringement or any</p> <p>12 invalidity defense, correct?</p> <p>13 A. Correct.</p> <p>14 Q. Do you agree that patent owners sometimes</p> <p>15 push the envelope in patent litigation by relying on</p> <p>16 an unrealistic scope for their patent claims?</p> <p>17 A. It happens, yes.</p> <p>18 Q. Do you agree that patent owners sometimes</p> <p>19 litigate based on what they wish the patent claims</p> <p>20 had said, rather than what the patent claims</p> <p>21 actually say?</p> <p>22 A. I don't know.</p> | <p style="text-align: right;">Page 80</p> <p>1 Q. You know Mark Lemley personally, correct?</p> <p>2 A. I do.</p> <p>3 Q. In fact, you've known him since the</p> <p>4 1990s, correct?</p> <p>5 A. I have.</p> <p>6 Q. You hold Mr. Lemley in high regard,</p> <p>7 correct?</p> <p>8 A. I do.</p> <p>9 Q. He is a professor at Stanford Law School,</p> <p>10 is that correct?</p> <p>11 A. Yes.</p> <p>12 Q. Stanford Law School is a very prestigious</p> <p>13 law school, correct?</p> <p>14 A. It is.</p> <p>15 Q. You're aware that in addition to serving</p> <p>16 as a professor at Stanford Law School, he's also a</p> <p>17 patent litigator, correct?</p> <p>18 A. Correct.</p> <p>19 Q. And you understand that the Lemley Where</p> <p>20 to File article studies the historical rates of</p> <p>21 success in patent infringement litigation, based on</p> <p>22 the district in which are the litigation was</p> |
| <p style="text-align: right;">Page 79</p> <p>1 MR. JOHNSON: Objection, outside the</p> <p>2 scope.</p> <p>3 THE WITNESS: I don't know about that,</p> <p>4 one way or the other. I mean, we can project into</p> <p>5 that certain conclusions, but I can't say that I've</p> <p>6 ever been involved in a case where that necessarily</p> <p>7 happened.</p> <p>8 (McKelvie Exhibit No. 4 was</p> <p>9 marked for identification.)</p> <p>10 BY MR. CHORUSH:</p> <p>11 Q. I'm going to hand you what has been</p> <p>12 marked as McKelvie Exhibit 4. Exhibit 4 is an</p> <p>13 article by Mark Lemley titled, Where to File Your</p> <p>14 Patent Case, correct?</p> <p>15 A. Correct.</p> <p>16 Q. If I refer to this article as the Lemley</p> <p>17 Where to File article, is that acceptable to you?</p> <p>18 A. Yes.</p> <p>19 Q. The Lemley Where to File article is a</p> <p>20 document you reviewed in preparing your expert</p> <p>21 report, correct?</p> <p>22 A. I did.</p> | <p style="text-align: right;">Page 81</p> <p>1 conducted, correct?</p> <p>2 A. Correct.</p> <p>3 Q. And would you please turn to page 8 of</p> <p>4 the Lemley Where to File article.</p> <p>5 A. Yes.</p> <p>6 Q. Just above table 3 is a sentence that</p> <p>7 reads, "even among these districts, the patentee win</p> <p>8 rate varies substantially. Table 3 sorts the top 33</p> <p>9 districts by patentee win rate." Do you see that?</p> <p>10 A. Yes.</p> <p>11 Q. Patentee is another word for patent</p> <p>12 owner, correct?</p> <p>13 A. Yes.</p> <p>14 Q. The title of table 3 is Patentee Win Rate</p> <p>15 in Districts With 25 Or More Outcomes, is that</p> <p>16 correct?</p> <p>17 A. Correct.</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> |

21 (Pages 78 - 81)

CONFIDENTIAL

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| <div>Page 106</div> <div>[REDACTED]</div> | <div>[REDACTED]</div> |
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CONFIDENTIAL

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| <p style="text-align: right;">Page 110</p> <p>1 [REDACTED] 2 [REDACTED] 3 [REDACTED] 4 [REDACTED] 5 [REDACTED] 6 [REDACTED] 7 [REDACTED] 8 [REDACTED].</p> <p>9 Q. Your opinion is that Forest likely would 10 have prevailed on infringement, correct?</p> <p>11 A. Yes.</p> <p>12 Q. What does likelihood mean in terms of a 13 numerical percentage?</p> <p>14 MR. JOHNSON: Objection.</p> <p>15 THE WITNESS: More probable than not.</p> <p>16 BY MR. CHORUSH:</p> <p>17 Q. Okay. So greater than 50 percent, 18 correct?</p> <p>19 A. At least.</p> <p>20 Q. Now, does likely mean 100 percent?</p> <p>21 A. Nope.</p> <p>22 Q. Okay. What's the range? You've told me</p> | <p style="text-align: right;">Page 112</p> <p>1 prevailed on infringement, do you mean something 2 between 51 percent and 80 percent?</p> <p>3 A. I mean likely. I don't think percentages 4 are helpful.</p> <p>5 Q. Well, but you just put a lower bound on 6 the number by saying greater than 50 percent, 7 correct?</p> <p>8 A. It's likely. I wouldn't say 50 percent 9 to a client. Because I don't think numbers are 10 helpful.</p> <p>11 Q. Okay. So for purposes of interpreting 12 your usage of the term likely, the jury should 13 simply understand it to mean greater than 50 14 percent, correct?</p> <p>15 MR. JOHNSON: Objection.</p> <p>16 THE WITNESS: It just means likely.</p> <p>17 BY MR. CHORUSH: 18 [REDACTED] 19 [REDACTED] 20 [REDACTED] 21 [REDACTED] 22 [REDACTED]</p> |
| <p style="text-align: right;">Page 111</p> <p>1 that likely means greater than 50 percent, but below 2 what?</p> <p>3 A. Just likely. You speak French. I speak 4 German.</p> <p>5 Q. Okay. So when the jury hears you say 6 that Forest was likely to win the Namenda patent 7 litigation, it should understand that to mean 8 something above 50 percent, correct?</p> <p>9 MR. JOHNSON: Objection.</p> <p>10 THE WITNESS: Yes.</p> <p>11 BY MR. CHORUSH:</p> <p>12 Q. But you're not setting any sort of an 13 upper limit for what that number could be, just --</p> <p>14 A. There is no value to it. What's a client 15 going to do, sleep better? Because you say 76 16 percent versus 75 percent?</p> <p>17 Q. Well, you've already told us that no 18 patent litigator offers a number like 80 percent, 19 correct?</p> <p>20 A. Correct.</p> <p>21 Q. So when you say likely -- strike that. 22 When you say Forest likely would have</p> | <p>1 [REDACTED] 2 [REDACTED] 3 [REDACTED] 4 [REDACTED] 5 [REDACTED] 6 [REDACTED] 7 [REDACTED] 8 [REDACTED] 9 [REDACTED] 10 [REDACTED] 11 [REDACTED] 12 [REDACTED] 13 [REDACTED] 14 [REDACTED] 15 [REDACTED] 16 [REDACTED] 17 [REDACTED] 18 [REDACTED] 19 [REDACTED] 20 [REDACTED] 21 [REDACTED] 22 [REDACTED]</p> |

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